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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-268

IRVING POLCOVER, *Petitioner*

v.

SECRETARY OF THE TREASURY, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

## PETITIONER'S REPLY BRIEF

### I.

In Point IV of the petition for writ of certiorari in this case petitioner contended that his rights under the Fifth and Sixth Amendments were violated from the very outset when he was *summarily* suspended and removed from his position with the Internal Revenue Service without a prior hearing (*Arnett* v. *Ken-*

*nedy,* No. 72-1118, prob. jurisdiction noted by this Court 4/2/73; *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S.Ct. 1011 (1970); *Morrissey* v. *Brewer,* 408 U.S. 471, 92 S.Ct. 2593 (1972).

At page 3 of his Memorandum of Opposition, the Solicitor General now states:

> ". . . petitioner alleges that he has a Fifth Amendment right to a . . . hearing *before* his discharge. This issue is now pending before this Court in *Arnett* v. *Kennedy,* No. 72-1118, probable jurisdiction noted on April 2, 1973.
>
> *"The Court may accordingly wish to defer action on this petition until after its decision in Kennedy."* (Italics supplied.)

Certainly petitioner is genuinely grateful for the Solicitor General's suggestion. However, in fairness, this case patently presents far more compelling reasons than even *Kennedy* as to why federal employees must be accorded a just, decent, constitutional hearing *before* they are arbitrarily discharged, separated from their federal positions and bluntly deprived of their sole means of livelihood after devoting 18 years or more outstanding service to the United States.

Moreover, this case raises other equally important constitutional questions regarding the nature or type of hearing which must be afforded in cases where federal employees are suddenly vaguely charged with a *job-connected crime.* Should the Government, at such a hearing, be required to carry the burden of proof, or should the employee be compelled to prove his own innocence? Should *criminal* charges against a federal employee have to be proved beyond a reasonable doubt in a federal job removal proceeding, especially where

the employee has already been unanimously acquitted of those same charges by a United States District Court and jury? Should the Government be compelled to confront the accused employee with his accuser and allow cross-examination when the employee demands that right, or should the Government be permitted to refuse and thereafter remove the employee from his federal position at the conclusion of such a Star Chamber proceeding?[1]

All of these vitally important constitutional issues are present in the instant case. Therefore, petitioner earnestly prays that instead of simply adopting the Solicitor General's aforementioned suggestion, this Court will grant certiorari in this case, schedule it for briefing and argument with or subsequent to *Kennedy,* and thereafter finally decide same on its own merits irrespective of the outcome in *Kennedy.*

## II.

Since the petition for certiorari was filed in this case, a very significant decision has been rendered by the United States District Court for the District of Columbia in the closely-related case of *Schwartz* v. *Secretary of the Treasury et al.,* C/A 699-72, U.S.D.C., D.C., 10/5/73, copy of which is printed in *Appendix I* to this brief.

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[1] At page 4 of his Memorandum, the Solicitor General erroneously states that Mr. Polcover was "accorded a full hearing subsequent to his discharge." Nothing could be less correct. As indicated, at the administrative hearings, held approximately *4 years after* his discharge, he was required to carry the burden of proof, he was denied the right to confront and cross-examine his accuser, and the Government failed to produce a single witness against him.

In that case, Mr. Schwartz, like petitioner Polcover, was employed as a fellow Internal Revenue Agent in New York. The same Mr. Goldstein charged both Mr. Schwartz and Mr. Polcover with bribery allegedly to obtain favorable tax audits for Goldstein's clients. Schwartz, like Polcover, was summarily discharged and later indicted. After many years of Government procrastination, the indictment against Schwartz was dropped for insufficient evidence and the Government filed a *nolle prosequi*. The Internal Revenue Service nevertheless continued to press the removal action against Mr. Schwartz, and through hearing *monstrosities* similar to those involved in this case, his discharge was perpetuated. The District Court, however, directed his reinstatement, holding:

> "Since plaintiff's removal was achieved in violation of his constitutional rights, plaintiff is entitled to a declaratory judgment that his removal was invalid and he is entitled to an order directing that he be reinstated to his position of Internal Revenue Agent, GS-11, Internal Revenue Service, Brooklyn, New York as of January 8, 1965, the date of his unlawful removal . . ."

*Ergo,* the travesty of justice inflicted on Agent Schwartz has now finally been rectified by the law. For Mr. Polcover, however, the Internal Revenue Agent who actually stood trial in federal court and was unanimously acquitted of the identical charge, the misery and poverty he has suffered for years still remain, subject to this Court's action.

## III.

In fact, even before the last mentioned decision in *Schwartz,* a third New York IRS Agent named Marsan, charged with Messrs. Polcover and Schwartz by the

same Mr. Goldstein, was directed to be reinstated to his position by the Regional Commissioner of Internal Revenue for the North-Atlantic Region on the ground that clearly there was totally insufficient evidence to sustain the spurious, repetitious charge of bribery simultaneously made against so many Internal Revenue Agents by the same Mr. Goldstein who was obviously seeking immunity from federal prosecution on charges completely unrelated to any of those involved in this case, *Schwartz* or *Marsan* (See *Matter of Justen Marsan,* Letter of Reinstatement dated 2/9/69, *Appendix II* hereto).

Finally, as the record in this case shows, *during Mr. Polcover's criminal trial in the United States District Court in New York, the accuser Mr. Goldstein openly admitted before the District Court that, on at least one other occasion, he had falsely accused a fourth Internal Revenue Agent of bribery, and there and then withdrew the charge against that agent.*

How, therefore, can this Court possibly deny certiorari in this case if this outrageous injustice against petitioner Polcover is to be rectified?

## IV.

In his memorandum in this case, the Solicitor General constantly leaves the inaccurate impression that hearing procedures conducted by the Internal Revenue Service and the Civil Service Commission in cases of this kind are fair and just and that same in no respect deprived Mr. Polcover of his basic constitutional rights. In *Ricucci* v. *United States,* 425 F.2d 1252 (Ct.Cl. 1970) those same hearing procedures were carefully scrutinized by the Court of Claims in a case wherein another

Internal Revenue Agent was charged with "improper business relations with a taxpayer whose returns the Agent had audited." After reviewing those procedures, the Court of Claims ruled in favor of the discharged Agent stating that the hearing procedures were conducted in violation of applicable regulations; that same were replete with abuses of discretion and that they were absolutely arbitrary and capricious (See 425 F.2d 1256). More specifically, however, Judge Skelton and Judge Collins in their concurring opinion described those same agency procedures petitioner Polcover was forced to endure in this case as follows, at 425 F.2d 1256-1260:

> "I *The Discharge of the Plaintiff Without A Hearing Denied Him Due Process*
>
> "The agency followed the usual practice of government departments by serving notice of charges on the plaintiff, allowing him to make an oral reply, and then summarily discharging him from his job without a hearing (notwithstanding his 24 years of government service). The government says this procedure was authorized by the regulations. This may be true, but in my opinion to deny an employee of the government who has civil service rights his job without a hearing, in the absence of a national emergency or government security problem, is to deny him his constitutional rights of due process. I can see no meaningful difference between this situation and that which existed in Goldberg v. Kelly, 397 U.S. 254. . . .
>
> "Consequently, I think that when the plaintiff was discharged without a hearing in our case, his property (his job) was taken from him without due process of law, notwithstanding any regulation or lack of one to the contrary. *A hearing for an*

*employee who has already been discharged could hardly be a meaningful one because it is a proceeding after the fact.*

"II *The Burden of Proof Was Erroneously Placed On The Plaintiff*

"At the hearing in this case (if we can dignify it by calling it a hearing), the examiner required the plaintiff to put on his evidence first. . . . In any event, at the time plaintiff was required to put on his evidence, no evidence had been offered against him. There was nothing at the hearing for him to rebut or overcome. *The defendant has the burden of proof on the whole case to show that plaintiff should be discharged for the good of the service. . . . To require the plaintiff to introduce his evidence first is like requiring an accused in a criminal trial to prove his innocence. In my opinion, this was an unauthorized shifting of the burden of proof and amounted to a denial of due process. . . .*

"IV *The Decision Was Not Supported By Substantial Evidence*

"In my opinion, the decision of the examiner against the plaintiff, which became the decision of the Commission, was not supported by substantial evidence. . . .

"V *The Plaintiff Was Not Given A Fair And Meaningful Hearing*

"The Supreme Court ruled in *Goldberg* v. *Kelly, supra:*

> '. . . The hearing must be at a meaningful time and in a meaningful manner . . .'

"In my opinion, there was no such hearing in this case. Actually, there was no hearing at all. The examiner went through a formality which was

called a hearing, but it was not held in a 'meaningful manner,' nor was it fair. As far as plaintiff was concerned, it was an exercise in futility. The case was 'cut and dried' against him in advance. The rules and regulations were not complied with except when their observance worked against him. The rights and privileges to which he was entitled under the law were denied him."

## CONCLUSION

Patently, the hearing procedures conducted against petitioner Polcover in the case at bar were, in the words of Judges Skelton and Collins, *supra,* nothing more than "an exercise in futility. The case was 'cut and dried' against him in advance." The constitutional "rights and privileges to which he was entitled under the law were denied him." Plainly, therefore, the petition for writ of certiorari in this case must be granted.

Respectfully submitted,

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October 12, 1973